

# Sexual violence with reference to the forthcoming Law for the Guarantee of Sexual Freedom in Spain

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## **SUMMARY**

I. Introduction

II. Objectives

III. Normative review and feminist legal theories

IV. Sexual violence and the new conceptualization of sexual assault

V. Due diligence and the right to full reparation

VI. Final considerations

VII. Bibliography

## I. Introduction

Clara Campoamor (1925) argued that the problem for women was none other than that of being “*forever judged by alien norms*”. That is, by norms developed and, subsequently, applied and interpreted based on a normative model of human experience built from a standpoint that is alien to the experiences and lives of women. Clara Campoamor’s words are particularly relevant to our times if one considers that one of the key political, social, and, of course, legal debates in Spain today is one centred on the need to analyse, study, and review criminal offences relating to sexual freedom and indemnity.

The ruling of the Provincial Court of Navarre in the *La Manada* case (Provincial Court of Navarre ruling 38/2018<sup>1</sup> of 20 March) led to reflections from the gender perspective about the terms under which norms are applied in Spain, and more specifically about the terms under which types of criminal offences are applied and interpreted in the case of crimes against sexual freedom and indemnity. The evolution and historical (and therefore normative) scrutiny of these crimes have always gone hand in hand with feminist legal demands concerning women’s rights. In this regard, one must bear in mind that the definition of rape as a crime rather than a sexual act is a fairly recent development that came thanks to feminist movements in the United States in the 1970s. Brownmiller (1975)<sup>2</sup> points to one of the core aspects of these criminal offences—power. From this perspective, Brownmiller does not hesitate to stress that rape (and the threat thereof) is a form of maintaining the power of men—in general—over all women (and, by extension, minors). It is therefore not possible to make a sexual abstraction of the subjects affected, let alone the place and position that the victim and the perpetrator occupy in the sex/gender system. Statistical data are clear in this regard. Hence the importance of thinking about the term rape (Vigarelo, 1999)<sup>3</sup> in line with the current definition of “sexual assault” in the Penal Code, the assessment of which always depends—in specific cases—on the presence of violence and intimidation. In the sexual sphere, violence has been delimited and identified by case law as “physical force”, while intimidation is considered with reference to “mental force”, which is not always easy to prove in contexts involving clear socio/sexual asymmetry. In this respect, we must quote Herman’s (2015 [1992])<sup>4</sup> lamentation of how women have learned that rape has been (and continues to

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1 Ruling 38/2018, of 20 March, of the Provincial Court of Navarre in the *La Manada* case may be consulted at <http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&datasematch=AN&reference=8363601&links=&optimize=20180427&publicinterface=true%20> (date consulted: 20/06/2020).

2 BROWNMILLER (1975).

3 VIGARELLO (1999).

4 HERMAN (1992).

be) a crime only in theory, since “(...) in practice the standard for what constitutes rape is set not at the level of women’s experience of violation but just above the level of coercion acceptable to men” (Herman, 1992; 72).

Perhaps the time is ripe to reverse this situation and to review the typology of criminal offences in light of the *Draft Organic Law on the Comprehensive Guarantee of Sexual Freedom* that is currently being debated in Spain, and to assess the terms under which they are being applied and interpreted. All of this must be done from the basis of a critical and constructive reflection that makes it possible to work towards equality, true to the tenets of anti-discrimination law.

## II. Objectives

Catharine MacKinnon (1983) claimed<sup>5</sup>—in the 1970s and 1980s—that the law sees and treats women the way men see and treat women. This statement serves as the perfect preamble for introducing a series of questions that are key to this study and the answers to which make it possible to define its objectives, namely:

- (a) In what terms has legal discourse thought (and in what terms does it currently think) about women?
- (b) Is legal discourse neutral?
- (c) What could one say has been (and is) the normative model of human experience, and what has been the effect of the configuration of said model when giving content to norms that seek to prevent violence against women?
- (d) What has been (and what is) the effect of said model when applying and interpreting norms?
- (e) Under what terms and subject to what parameters has sexual violence been conceptually defined? As circumstantial and/or neutral violence? Or as instrumental and structural violence?
- (f) Where has progress been made? What are the current challenges in the context of legal analysis? Are there risks of regression?
- (g) What is the transformative potential of applying a gender perspective as a methodology of legal analysis when approaching sexual violence?

These concise questions serve as a common thread for conducting a normative review from the perspective of feminist legal theories (Smart, 1994<sup>6</sup>;

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5 MacKINNON (1983), pp. 635-658.

6 SMART (1994), pp. 167-177.

Facio, 2000<sup>7</sup>; Picht, 2003<sup>8</sup>; Jaramillo, 2009<sup>9</sup>), in order to reflect on the way in which the law has thought (and thinks) about women regarding crimes against sexual freedom and indemnity. The fact remains that anyone who thinks also builds an imaginary, in this case a legal imaginary that constructs and outlines subjects of law (a normative model of human experience). Depending on the terms under which the law constructs subjects, one will be presented with either subjects whose rights are recognized or subjects to whom rights are conceded. To talk about and distinguish between “recognition” and “concession” of rights along these lines implies distinguishing and identifying different degrees of legal and political subjectivity. It implies recognizing that there are autonomous subjects and heteronomous subjects, self-designated subjects (with the ability to reach agreements) and hetero-designated subjects (subjects agreed upon). The latter are subjects whose subjectivity is constructed based on the viewpoint of the Other, i.e., based on otherness, alterity, inessentiality, and/or periphery in relation to the normative model of human experience.

It goes without saying that these considerations have affected, and continue to affect, normative policies in addressing gender-based violence, and therefore sexual violence. As such, this article invites the reader to question the law in order to ascertain the role it currently plays: whether it be an uncritical role sustaining the sex/gender system under the paradigm of normative and/or formal equality; or, conversely, a transformative role based on the critique and reformulation of legal categories within the framework of anti-discrimination law. It is based on these premises that we call for a review of the normative effectiveness of criminal offence typology in matters relating to sexual freedom and indemnity, as well as current proposals for their reform.

### III. Normative review and feminist legal theories

Title VIII of Book II of the Spanish Penal Code classifies crimes against sexual freedom and indemnity in articles 178 to 194. For the purposes of this article, it is worth noting how these criminal offences traditionally fell under the category of “crimes against honesty”. This was the case up until the reform enacted by Organic Law 3/1989. Subsequently, and following the reform enacted by Organic Law 11/1999, they came to be defined as crimes against sexual freedom

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7 FACIO (2000), pp. 15-44.

8 PITCH (2003).

9 JARAMILLO (2009), pp. 103-133.

and indemnity (Goenaga, 1997)<sup>10</sup>. The protected legal right is clearly that of sexual freedom, which carries with it an implicit recognition of personal autonomy, which in this specific case pertains to the sphere of sexual corporeality. The scientific doctrine has come to coin it as “self-determination or free disposition of sexual potentiality and the right not to be involved in a sexual act without consent”. Following on from the above, the protected legal right in the case of minors is not that of sexual freedom but of sexual intangibility and indemnity.

With regard to the protected legal right in the criminal offences mentioned, it is important to quote ruling no. 252/2008 of 20 October of the Provincial Court of Barcelona (Section 9), which makes it clear that what is being protected is not honesty but sexual freedom. Concerning sexual freedom, the Supreme Court ruling of 6 November 1992 states:

“(...) Every human person, regardless of their activity or condition, has the inalienable right to decide on their sexuality. As the scientific doctrine has rightly stated, the protected legal right is sexual freedom in its dual facets of self-determination or free disposition of sexual potentiality and the right not to be involved in a sexual act without consent”.

Similarly, it is worth highlighting the Supreme Court ruling of 18 October 1993, which provides that:

“(...) Sexual freedom is violated, infringed, and undermined because the will of the violated, injured, and assaulted person is ignored, thus leading to an understanding, in a unity of concepts, of will as a synonym of freedom. This sexual freedom, which perhaps upholds the most important facet of human nature, allows a person, man or woman, to develop their sexual desires to the extent that they wish, and however they may wish to do so, in line with their wants and to the extent that their partner naturally allows them, by means of the consent that must govern these relations, within the most absolute equality of the sexes”.

Evidently, the recognition of sexual freedom as a protected legal right was a turning point in the legal and political subjectivity of women. This situation has nevertheless not succeeded in deploying its full normative effectiveness in terms of the protection of women’s rights, as illustrated by ruling no. 38/2018 of the

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10 GOENAGA (1997), pp. 95-120.

Second Section of the Provincial Court of Navarre of 20 March. The trial court's classification of the proven facts as sexual abuse rather than sexual assault laid bare the prevailing androcentrism in law with regard to the "non-recognition" (or partial recognition) of women's rights in the socio/sexual sphere.

The situation described—regarding the legal approach to sexual violence—is not new, as it has been denounced for years by feminist legal critics within the framework of so-called anti-discrimination law. Hence the need to take into account the gender perspective among the criteria of normative application and interpretation (Torres, 2017<sup>11</sup> and 2018<sup>12</sup>), in keeping with the rest of the criteria set out in article 3<sup>13</sup> of the Civil Code, along with those specifically relating to fundamental rights. The reason for this is not insignificant if one considers the terms under which the legal discourse has traditionally thought about women.

The reading of the ruling of the Provincial Court of Navarre in the *La Manada* case is a clear example of the perpetuation of an aged legal discourse in which everything revolves around a (falsely abstract) central subject that is neither neutral nor remains detached from the socio/sexual construction of reality. Evidence of this may be found in how the proven facts were subsumed under the type of criminal offence according to the legal classification of the facts. This is because—crucially—the victim's credibility was not under discussion (other than the dissenting opinion). And all of this came after having followed a process with full procedural and constitutional guarantees under a social and democratic rule of law.

Reference was made above to the terms under which the law—in general—has thought about women. This thinking has been expressed around a legal subjectivity materialized in a sexual and reproductive corporeality that has been alien to women, since it has been built from the dominant position of the normative subject of human (male) experience. In this respect, one must consider the poor recognition of women's sexual and reproductive rights in Spain, still at the expense of the Constitutional Court's ruling. Or consider the attempts to regulate surrogacy (Torres, 2020)<sup>14</sup> and the proposals to regulate and/or legalize prostitution (Torres, 2020)<sup>15</sup>. Note how in all these cases the object of regulation is women's bodies—that is, what may or may not be done with them and/or

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11 TORRES DÍAZ (2017), pp. 181-214.

12 TORRES DÍAZ (2018).

13 Article 3 of the Spanish Civil Code provides that: "1. Rules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose. 2. Equity must be taken into account in applying rules, but the resolutions of the Courts may only be based exclusively on equity when the law expressly allows this".

14 TORRES DÍAZ (2020).

15 TORRES DÍAZ (2020), pp. 121-148.

what may or may not be acceptable and/or legitimate in this regard. The same remarks may be extrapolated—albeit with some caveats from the perspective of the subjective scope of application—to the penal sphere with respect to crimes against sexual freedom and indemnity.

Returning to the topic of sexual violence, below is a summary of the terms under which criminal protection has taken shape when faced with crimes against sexual freedom and indemnity:

1. With regard to the crime of sexual assault, it is worth noting that what is relevant for the purposes of this article is the *requirement of violence or intimidation* in the case of a basic offence, as well as vaginal, anal, or oral penetration in the case of an aggravated offence. From a gender perspective, it is worth seriously reflecting on the terms under which the current legal language continues to define violence or intimidation. The fact remains that the socio/sexual asymmetry of the sex/gender system obliges us to position ourselves in the place of women—particularly in contexts of a sexual nature, where the subordination and objectification of women is patent and manifest. In this regard, what is needed is a broadening of viewpoints in order to conceptualize situations of environmental sexual violence.

2. With regard to the crime of sexual abuse, anyone who, *without violence or intimidation and without consent*, performs acts that violate the sexual freedom or indemnity of another person is found guilty of sexual abuse. Feminist legal critics have questioned the non-acknowledgement of violence or intimidation in contexts without consent. In this respect, one must bear in mind that sexual consent (and its legal expression), in the case of crimes against sexual freedom and indemnity, transfers responsibility to women when it comes to establishing limits on men's sexual insistence (Oxman, 2015)<sup>16</sup>. From this lens, it is women who bear the burden of proof regarding their refusal of unwanted sexual advances.

3. We observe that the defining and differentiating element between sexual assault and sexual abuse in our legal system is that of violence or intimidation. This "violence" replaces the requirement of "force" in the previous regulation, which was expressed in contrast to the requirement of resistance by the victim, and which allowed many cases of suspected sexual assault to go unpunished, since

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16 OXMAN (2015), pp. 92-118.

they could not be proven. Concerning “intimidation”, it is worth highlighting the ability to instil fear and/or dread in the victim, which has a direct impact on the free exercise of individuality and the free development of personality in sexual matters. With regard to “abuse with undue influence”, it is worth pointing out that it has its origins in behaviours aimed at obtaining sexual favours through vitiated consent derived from a position of superiority. In this respect, it is worth mentioning the critical voices that call into question the place of undue influence within the sexual abuse offence, since it prevents many behaviours from being classified as sexual assault.

Focusing our analysis on the ruling of the Provincial Court of Navarre of 20 March 2018, the following aspects merit attention:

1. Firstly, the absence of a gender perspective in the ruling in question—in other words, the failure of the court to position itself in the place of the victim when analysing the situation and the context in which the proven facts took place; a context of clear socio/sexual asymmetry that implies violence and intimidation.

2. Secondly, the need to initiate a legal debate on a possible penal reform with regard to crimes classified under Title VIII of Book II of the Penal Code from a gender perspective. In this regard, it is necessary to analyse quantitative data on who are usually the passive subjects in this type of crime (women and minors), as opposed to the active subjects (men).

3. Thirdly, the need for a rewording of the crime of sexual assault, in keeping with the terms of the Istanbul Convention, which has been mandatory in our legal system since August 2014. This body of law defines sexual assault (rape) in the following terms: “Any non-consensual vaginal, anal or oral penetration of the body of another person where the penetration is of a sexual nature, with any bodily part or with an object”.

#### **IV. Sexual violence and the new conceptualization of sexual assault**

On 4 July 2019, the Criminal Division of the Supreme Court ruled on the appeal for judicial review no. 396/2019 in the case known as *La Manada*. Supreme



Court ruling 344/2019, of 4 July, represents an important step in the conceptual delimitation of crimes against sexual freedom and indemnity, demonstrating the transformative capacity of gender as a category of legal analysis and a bastion for revealing the socio/sexual power structure implicit in legal discourse, becoming key in categorizing the gender perspective as a methodology to be followed in the court's legal *praxis*. The High Court's assessment that there had indeed been intimidation and violence was key for classifying the proven facts as rape and not as mere sexual abuse. Likewise, it made it possible to shift the attention towards the behaviour of the aggressors rather than the victim's reaction or whether or not there was consent. The High Court's ruling marks a "before and after" moment and outlines the terms for a future reform of the relevant criminal offence typology.

The most significant aspects are listed below:

1. The High Court classifies the proven facts as "rape". To be exact, it speaks of a "continued crime of rape". It therefore uses the term "rape" rather than "sexual assault", which helps to create a critical symbolic imaginary of reproach that goes beyond the merely criminal (and hence legal) sphere. As such, what it says and how it is said in the ruling will be key in giving women a central place in the protection of their rights when confronted with this type of crime. Moreover, the Supreme Court applies two specific aggravating factors, namely: (a) humiliating and degrading treatment of the victim and (b) joint action by two or more persons.

2. The Supreme Court speaks of an incorrect application of criminal offence typology in the previous rulings (ruling of the Provincial Court of Navarre, 26 April 2018; and ruling of the Superior Court of Justice of Navarre, Civil and Criminal Division, 30 November 2018). But, what is more, with a certain air of reproach, it hints at their incomprehensible failure to observe their own doctrine on the matter by not acknowledging the intimidation requirement. Let us recall that the Superior Court of Justice of Navarra had stated "(...) that the proven facts of the Court's ruling (...) do not include the indispensable action of intimidation or threat on the part of the defendants, whether express or tacit".

3. The High Court crucially indicates how, based on the factual account contained in the first instance ruling, "(...) a truly intimidating scenario is described"—a scenario in which "(...) the victim at no time consents to the sexual acts carried out by the accused". This reference to an "intimidating scenario" is crucial for the High

Court in expressing the maximum criminal sanction in its contextual analysis. Indeed, it describes how the given situation caused the victim to “(...) adopt an attitude of submission (...) faced with the anguish and intense stress that the situation produced in her, given the hidden, narrow, and dead-end location into which she was forcibly introduced, as well as the personal circumstances of the victim and the accused”. The High Court does not stop there, but specifies the terms under which these circumstances “were taken advantage of” by those sentenced “in order to perform the acts against her freedom”. It further specifies: “(...) at least 10 sexual assaults involving oral, vaginal, and anal penetration”.

4. The Supreme Court is forceful and specifies that the error of legal classification of the first instance ruling is not solely and exclusively limited to having established sexual abuse rather than sexual assault, but further that it failed to consider the fact that there was not just one continuous crime of rape, but rather a number of sexual assault offences by perpetrators and participants.

The briefly outlined Supreme Court ruling brought about a change and/or materialization in normative interpretation and application, for the sake of legal security in the face of crimes against sexual freedom and indemnity. In this regard, intimidation—as a key component to be considered—is no longer assessed based on the “legal neutrality” of the aggressors’ position of socio/sexual power, and is instead assessed based on the asymmetry in which women are placed by the sex/gender system in contexts of a sexual nature. This is undoubtedly an important step forward in light of the recent introduction of the *Draft Organic Law on the Comprehensive Guarantee of Sexual Freedom*<sup>17</sup>.

The following section focuses on the analysis of the most significant developments that the *Draft Law* incorporates in terms of the legal approach to crimes against sexual freedom and indemnity:

1. The *Draft Law* proposes to repeal the crime category of sexual abuse, such that any act against sexual freedom and indemnity falls under the crime of sexual assault (First Final Provision, section 8 of the *Draft Law*).

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17 The Council of Ministers of 3 March 2020 approved the *Draft Organic Law for the Guarantee of Sexual Freedom*. Available at: <https://www.lamoncloa.gob.es/consejodeministros/referencias/Paginas/2020/refc20200303.aspx> (date consulted: 20/06/2020).

- The proposed new wording for article 178 of the Penal Code is as follows:
  - “1. Anyone who performs any act that violates the sexual freedom of another person without his or her consent shall be punished with a prison term of one to four years for sexual assault. It shall be understood that there is no consent when the victim has not freely expressed, by means of overt, conclusive, and unequivocal acts in accordance with the attendant circumstances, his or her express will to participate in the act.
  - 2. For the purposes of the preceding section, sexual assault shall be deemed to consist of such acts of a sexual content that are performed with the use of violence, intimidation, or abuse of a situation of superiority or vulnerability of the victim, as well as those committed against persons who have been rendered unconscious or whose mental condition has been taken advantage of, and those performed when the victim has been deprived of his or her will for whatever reason.
  - 3. The Judge or Court may, in the grounds for their ruling, and provided that the circumstances set out in article 180 do not apply, impose the lesser prison term or a fine of eighteen to twenty-four months, in consideration of the lesser nature of the incident”.

2. The *Draft Law* decreases prison terms for basic sexual assault offences, as set out in the literal wording of First Final Provision, section 8. In this respect, a penalty of one to four years is proposed, compared to one to five years in the current wording in the Penal Code.

3. A specific aggravating factor related to marital or emotional ties is created (First Final Provision of the *Draft Law*). The proposed new wording of article 180 would be as follows:

- “1. The above behaviours shall be punished with a prison term of two to six years for the aggressions established in art. 178.1, and of seven to twelve years for those established in art. 179 when any of the following circumstances apply:

(...) 4. When the victim is or has been a wife of the offender or is a woman who is or has been associated with the offender in an analogous relationship of intimacy, with or without cohabitation (...).”

4. Articles 19 to 27 of Title III of the *Draft Law* include professional training and specialization as a guarantee for specialized treatment. The wording of article 19, paragraph 1, is as follows:

“1. Professional specialization shall be guaranteed through compulsory initial training and ongoing training, which all professional sectors involved in the prevention of sexual violence and in the response thereto must receive (...).”

5. Special attention ought to be paid to articles 22 (training for Security Forces and Bodies), 23 (training in judicial and prosecutorial professions, and of court clerks in the Administration of Justice), 24<sup>18</sup> (training in the field of legal practice), and 25<sup>19</sup> (training in the forensic field). With regard to training in the judicial and prosecutorial professions, the instruction provides that:

“1. The Ministry of Justice and the General Council of the Judiciary shall adopt the necessary measures to guarantee the inclusion, as part of the curriculum for access to the judicial and prosecutorial professions, as well as that of court clerks in the Administration of Justice, of topics devoted to equality and non-discrimination based on gender, and in

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18 The literal wording of article 24 of the draft law is as follows: “1. Public Administrations, in collaboration with Bar Associations, shall promote the adequate training of legal professionals responsible for assisting victims of sexual violence. 2. Bar Associations, when they require specialization courses for work as a public defender, shall include a specific line of training on sexual violence as part of the subject of gender-based violence”.

19 Article 25 sets out: “1. Public Administrations, within the scope of their respective competences, shall ensure that Forensic Medicine Institutes, as part of the initial and ongoing training of the multidisciplinary teams of professionals belonging to comprehensive forensic assessment units, include the gender perspective, as well as training to identify sexual violence (...).”

particular the comprehensive protection against all forms of sexual violence.

2. The Ministry of Justice and the General Council of the Judiciary shall ensure the inclusion, as part of the initial and ongoing training of members of the Judicial Profession, the Prosecution Ministry, and other bodies in the service of the Administration of Justice, of topics devoted to a gender perspective (...)."

Without ignoring other developments of interest for the present article, special attention should be paid to the requirement of express, free, and unequivocal consent in the definition of the crime of sexual assault, as featured in the new wording of article 178 of the Penal Code. Regarding consent, the proposed wording of article 178 of the Penal Code reads as follows:

- "(...) It shall be understood that there is no consent when the victim has not freely expressed, by means of overt, conclusive, and unequivocal acts in accordance with the attendant circumstances, his or her express will to participate in the act".

The definition of "sexual consent" in the above terms has sparked a legal debate, on account—not solely—of the difficulties it may bring in evidentiary matters. The fact is that for behaviour to be classed as an offence, it must be proven that consent was not free, express, and unequivocal. The legal debate around sexual consent arises in different domains, essentially because no definition of sexual consent exists, and therefore it is up to the courts to ultimately establish whether there was consent or not. In this respect, it is worth remembering that the current wording of the Penal Code implies that any sexual contact without consent already amounts to a criminal offence. The issue arises in the *legal praxis* of the court when this type of situation occurs in contexts where the victim's statement is the sole incriminating evidence to disprove the presumption of innocence of the accused. As a result, case law criteria will need to be observed and applied for the statement of the victim/witness to have sufficient incriminating capacity for the purposes of obtaining a conviction (Supreme Court rulings of 5 December 2013 and 6 March 2019), namely:

1. Absence of subjective disbelief.
2. Plausibility of testimonial evidence.
3. Persistent incrimination.

For the sake of completeness, and with regard to the position of the victim/witness in the criminal proceedings, it will be necessary to comply with the provisions of the latest case law of the High Court, where a gender perspective is applied as a methodology of legal analysis, insofar as it has been made clear that the victim/witness in contexts of gender-based violence must be considered a qualified witness of the aggressions suffered. This circumstance has a clear practical dimension, in that it makes it possible to grant greater probative value to their testimony, as opposed to that of a mere external witness. Legal grounds 2 of Supreme Court ruling 2182/2018, Criminal Division, 13 June 2018, states the following:

- “(...) It must be made clear that in this case, victims of acts of gender-based violence testify in court from a different position to witnesses who saw the incident (...). In these cases, the victim procedurally has the status of a witness, but unlike the rest of the witnesses, he or she is a victim, and this ought to have a certain distinguishing bearing on the means of evidence, since positioning the victim within the category of a mere witness denatures the true position of the victim in the criminal proceedings, given that he or she is not simply someone who ‘saw’ an incident and can testify about it, but is the passive subject of the crime, and due to his or her probative categorization, must be given more weight than the mere unrelated and external witness to the incident (...).”

Notwithstanding the above, the proposed reform has given rise to conflicting positions and legal doubts concerning the message that has been conveyed to the public under the slogan “*solo sí es sí*” (only yes means yes) in the socio/sexual sphere. For those who oppose the reform, these doubts could undermine the right to the presumption of innocence and, therefore, effective judicial protection by passing the burden of proof to the accused, thus perverting the logic of criminal proceedings by establishing a *iuris tantum* presumption of guilt of the accused—in other words, what the scientific doctrine has come to refer to as *probatio diabolica* of negative facts (ruling 140/1991 of the Constitutional Court, 20 June<sup>20</sup>, among others). Naturally, all of these aspects will need to be legally assessed and considered from a clear gender perspective, so as not

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20 The Spanish Constitutional Court provides the following in ruling 140/1991: “Among this content of the fundamental right, it is presently worth highlighting the requirement of a sufficient body of evidence, with the acting Public Administration having the burden of proof for both the committing of the illicit act and the participation of the accused, without the latter being required to provide a *probatio diabolica* of negative facts”.

to distort the core legal principles at work in the procedural-penal sphere, but without overlooking the difficulties faced by the victims of these types of crimes and the insufficiencies of their current legal treatment, which has shown itself to be incapable of laying bare the socio/sexual power structures in contexts of a sexual nature.

The foregoing explains why certain sectors may have focused their proposals for reform on the removal of the crime category of sexual abuse and on the requirement of explicit consent, so that where there is no explicit consent, there is a crime of sexual assault. In turn, the proposals also make reference to the effects of vitiated consent, with consent being considered non-existent if there are peripheral elements that prove that it was granted under coercion. In a similar vein, there has been an emphasis on the recognition of “environmental intimidation” to prove that no consent was given, and on banning any evidence in court regarding the victim’s sexual history.

These are no doubt significant challenges that must be approached based on a gender-sensitive analysis that is able to position itself in the place of the victim and the perpetrator, in order to identify the asymmetries of socio/sexual power that operate in this domain.

## **V. Due diligence and the right to full reparation**

Two of the aforementioned *Draft Law*’s innovations deserve special attention, namely:

1. Reference to due diligence.
2. Recognition of victims’ right to full reparation.

Regarding due diligence and state accountability, the *Draft Law* rightly cites Recommendation 35 (2017) of the CEDAW Committee on gender-based violence against women, which sets out the scope of the obligations of states regarding all forms of violence against women committed by state agents or private individuals, including sexual violence, declaring that these must include the obligation to prevent, investigate, prosecute, and punish those responsible and ensure reparation for victims. In turn, article 2, section 2 of the *Draft Law* makes express reference to this, establishing it as a guiding principle for action in the following terms:

- “Due diligence. The response to sexual violence shall extend to all spheres of institutional accountability, such as prevention,

protection, assistance, reparation for victims, and the pursuit of justice, and shall be aimed at guaranteeing the recognition and effective exercise of rights”.

The projection of due diligence in the aforementioned normative text is found, for instance, in the expression of the right to specialized comprehensive assistance, in the right to information and comprehensive support, in the guarantee of access to justice, and in the guarantee of providing training to all legal (and non-legal) agents whose activities belong to this domain.

On the concept of due diligence, see the recent Spanish Constitutional Court ruling 87/2020 of 20 July 2020, where the highest constitutional interpreter alludes to the positive obligation of the States to act and guarantee fundamental rights.

Concerning the right to full reparation, the Explanatory Statement of the *Draft Law* establishes it as a fundamental right in the context of state obligations with regard to human rights. Article 49 of the aforementioned legal text sets this out as follows:

- “Women victims of gender-based violence have the right to reparation, which includes monetary compensation for damages and losses resulting from the violence, the necessary measures for their full physical, mental, and social recovery, actions of symbolic reparation, and guarantees of non-repetition (...)”.

As for the content of the right to full reparation, it is worth mentioning the right to compensation for damages and losses suffered (physical, mental, moral, loss of opportunities, material damage, loss of income, therapeutic and medical treatments, etc.). In the same vein, it refers to the guarantee of full physical, mental, and social recovery, which must be observed by the Public Administration, as well as effective protection against any retaliation or threats, which shall require the promotion of specific programmes aimed at persons convicted of crimes against sexual freedom.

## V. Final considerations

The legal debate on sexual violence is a reality in Spain, as shown by reactions in the legal (and social) sphere to recent high-profile cases of group rape. Examples include the *La Manada de los Sanfermines* case, the *La Manada de Manresa* case, and the *Arandina* group rape case. It is in this context that the *Organic Law on the Comprehensive Guarantee of Sexual Freedom* was born. It



seeks to bring together the demands of feminist legal collectives and the latest case law of the Supreme Court mentioned earlier in this article and materialized in the Supreme Court ruling no. 344/2019 of 4 July. The legal approach to the matter is complex and, in any event, must start from a critical reflection on the legal construction of subjects of law (De Cabo, 2010)<sup>21</sup> based on a critique of the legal dogma on women's sexual corporeality and its implications in contexts of a sexual nature, in relation to which the Penal Code has evolved in the delimitation of crimes against sexual freedom and indemnity. This evolution may be traced back to when we stopped talking about "honesty" as the protected legal right and began to talk instead about "sexual freedom". In order to be full and effective, sexual freedom requires the prior recognition of the sexual and reproductive autonomy (Torres, 2014) of women as full legal/political subjects. On the basis of these approaches, the legal debates underway must come together around a series of parameters:

- (a) The comprehensive questioning of the theoretical and conceptual framework from which legal discourse has constructed women (and men), in order to identify the prevailing socio/sexual power structures and their effects in the penal sphere and, more specifically, in terms of crimes against sexual freedom and indemnity.
- (b) A critical reflection on the legal discourses formed around women's bodies as body-objects (instead of subjects) for the satisfaction of the needs of others in the sexual and reproductive sphere.
- (c) The recognition of women's sexual corporeality and its implications in any relational sphere, which brings with it a constitutional recognition of the sexuation of the subjects of law and, therefore, an express recognition of women's bodily autonomy (the right to one's own body) in the sexual and reproductive sphere.

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